

**Remarks**

This Application has been carefully reviewed in light of the Office Action mailed August 1, 2005 ("Office Action"). At the time of the Office Action, Claims 1-36 were pending in the application. In the Office Action, the Examiner rejects Claims 1-36. Applicant makes no amendments and respectfully requests reconsideration of the claims in light of the following comments.

**Section 103 Rejections**

The Examiner rejects Claims 1-36 under 35 U.S.C. 103(a) as unpatentable over U.S. Patent No. 5,546,379 to Thaweethai ("*Thaweethai*"). In the Office Action, the Examiner points out that the Board upheld the previous rejection of Claims 2, 11, 20, and 28 and contends that the currently presented independent claims are broader than the previously presented Claims 2, 11, 20, and 28. Applicant respectfully traverses and submits that Applicant's amendments to the independent claims (as presented in the previously filed Amendment) introduced requirements distinct from the requirements of previously presented dependent Claims 2, 11, 20, and 28. Moreover, Applicant respectfully submits that these amendments address the Board's concerns and distinguish the claims from *Thaweethai*.

On appeal, the Board broadly interpreted the term "performance attribute" as used in the claims of the present application, stating that the Applicant "has not recited in any independent claim on appeal the nature of the disclosed performance attributes." *Decision*, page 5. Based upon this, the Board relied upon the predetermined modem characteristics of *Thaweethai* (which include fixed information such as the type of the modem) for the rejection of the claims.

Applicant respectfully submits that the previously submitted amendments to the independent claims specifically recite the nature of the claimed performance attributes, thus addressing the Board's concerns and distinguish the claimed performance attributes from the predetermined modem characteristics of *Thaweethai*. Moreover, the previously submitted amendments to the independent claims provide requirements different from the requirements of dependent Claims 2, 11, 20, and 28.

Consider Claim 1, as currently presented, which recites:

1. An access server, comprising:  
a plurality of modems;

a memory operable to store a performance attribute for each modem, wherein for each of the modems, the performance attribute indicates operating performance of the modem as monitored over a period of operation of the modem;

an allocation module coupled to the memory and operable to receive a modem request and to select a modem for service according to the modem's performance attribute; and

a telecommunications interface coupled to the allocation module and operable to couple a remote modem to the selected modem.

The performance attribute thus "indicates operating performance of the modem as monitored over a period of operation of the modem." This requires a specific nature of the disclosed performance attributes, which is distinct from the requirements of Claim 2, which recites:

the monitoring module operable to monitor the selected modem's performance and to modify the performance attribute for the selected modem according to the modem's performance.

Claim 2 thus merely requires the ability to modify the performance attribute, but does not directly address the Board's concern regarding "the nature of the disclosed performance attributes." According to the Board, the modification of performance attributes (as recited in Claim 2) could potentially cover the updating of tables to reflect changes of connection information as taught by *Thaweethai* at Column 13 with respect to BOND multiplexing. *Decision*, page 10. Applicant's previously submitted amendments to the independent claims address the Board's concern regarding "the nature of the disclosed performance attributes" and overcome the rejection based on *Thaweethai*.

In particular, Applicant's Claim 1, as currently presented, addresses "the nature of the disclosed performance attributes" in a manner not previously accomplished by dependent Claim 2. Specifically, Claim 1 requires that "the performance attribute indicates operating performance of the modem as monitored over a period of operation of the modem." The performance attribute thus reflects *actual operating performance of the modem*. As *Thaweethai* repeatedly makes clear, its disclosed modem characteristics are predetermined, fixed qualities (such as the type of the modem, which will never change for that modem and does not reflect actual operating performance of the modem as monitored over a period of time). *Thaweethai*, col. 2, ll. 44-49; col. 18, ll. 52-56; and col. 19, ll. 1-6. The nature of the

performance attributes of Claim 1 are thus distinct from the predetermined modem characteristics of *Thaweethai*. Moreover, the ability to update tables to reflect new connections between modems, as relied on by the Board as teaching Claim 2, does not teach or suggest the nature of Applicant's claimed performance attributes as recited in Claim 1. *Thaweethai* does not even disclose any monitoring mechanism that could determine a performance attribute that "indicates operating performance of the modem as monitored over a period of operation of the modem."

For at least these reasons, *Thaweethai* fails to teach or suggest all elements of Applicant's Claim 1. For analogous reasons, *Thaweethai* fails to teach or suggest all elements of the other independent Claims 10, 19, and 28. Applicant thus respectfully requests reconsideration of the rejection and full allowance of all claims.

**Conclusion**

Applicant has made an earnest attempt to place this case in condition for allowance. For the foregoing reasons, and for other reasons clearly apparent, Applicant respectfully requests full allowance of all pending claims.

If the Examiner feels that a telephone conference would advance prosecution of this Application in any manner, the Examiner is invited to contact Kurt M. Pankratz, Attorney for Applicant, at the Examiner's convenience at (214) 953-6584.

Although no fees are believed due, the Commissioner is hereby authorized to charge any fees or credit any overpayments to Deposit Account No. 02-0384 of Baker Botts L.L.P.

Respectfully submitted,

BAKER BOTTS L.L.P.  
Attorneys for Applicant



Kurt M. Pankratz  
Reg. No. 46,977

Date: November 1, 2005

**CORRESPONDENCE ADDRESS:**

at Customer No.

**05073**